Supreme Court, U.S.
FILED
JAN 26 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1157

EDWARD J. ROSEWELL, etc., et al.,

Petitioners,

vs.

LA SALLE NATIONAL BANK, TRUSTEE, etc.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Midwest Law Printing Co., Chicago 60601, FInancial 6-3988

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners Edward J. Rosewell, Treasurer of Cook County, Illinois, and Thomas M. Tully*, former Assessor of Cook County, Illinois, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 24, 1979.

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* Thomas M. Tully held the office of Assessor of Cook County on the date the complaint was filed. He has been succeeded in office by Thomas C. Hynes, who was duly elected Assessor of Cook County in November of 1978.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 604 F.2d 530 (7th Cir. 1979), and appears herein as Appendix A. The memorandum order of the District Court is not reported, and appears herein as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on August 24, 1979. A timely petition for rehearing *en banc* was denied on October 30, 1979.* That order appears herein as Appendix C. This petition was filed within 90 days from that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the remedies which may be had by a real estate taxpayer in the courts of Illinois, including a state civil rights action premised on 42 U.S.C. § 1983, or a statutory refund without interest, are "plain, speedy and efficient" within the meaning of 28 U.S.C. § 1341 so as to bar federal injunctive relief from alleged overassessment which is claimed to violate the taxpayer's civil rights.

* The order of October 30, 1979 notes that "Judges Pell, Sprecher, Bauer and Wood voted to grant the suggestion for rehearing *in banc*." The active judges of the Seventh Circuit thus split 5 to 4 on the *en banc* suggestion.

FEDERAL STATUTES PROVIDE IN PERTINENT PART

Title 28 U.S.C.

§ 1341. Taxes by States:

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

§ 1343. Civil rights and elective franchise:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

(3) To redress the deprivation under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

Title 42 U.S.C.

§ 1983. Civil action for deprivation of rights:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

This case presents the question whether two facets of Illinois' judicial remedies available to taxpayers who desire to contest their taxes square with the federal Anti-Tax Injunction Statute. The taxpayer maintains that the state statutory legal remedy, which is available and usually followed in the situation involved herein, is not "plain, speedy and efficient" because pre-judgment* interest is not paid on refunds received in the state court. The taxpayer has also contested the efficiency of a state court action based on 42 U.S.C. § 1983 to remedy the alleged overassessment of the property. The Seventh Circuit agreed with these arguments and held that injunctive relief was appropriate.

The case is presented on the pleadings only, since the district court granted the petitioners' motion to dismiss. The well pleaded allegations of the complaint thus form the factual basis for the determination of the issues raised herein. *Walker Process Equipment Inc. v. Food Machinery and Chemical Corp.*, 382 U.S. 172, 174-75 (1965).

The taxpayer alleges that it is the titleholder of real property which was allegedly overassessed by the Cook County Assessor for tax year 1977; that its property was assessed at over three times the amount that property in its class should have been assessed; and that the taxes claimed by the Collector are also over three times the proper amount.

The taxpayer asserted that its only remedy in the state court was by way of payment under protest of the

* "Pre-judgment interest" as used in this petition means interest upon tax refunds computed from the time of payment to the time of the entry of the order of refund.

full amount of tax claimed by the Collector, and thereafter objecting at the Collector's annual Application for Judgment. (Sections 194 and 235 of the Revenue Act; Ill. Rev. Stat. 1977, ch. 120, sec. 675 and 716). The taxpayer alleges that the "customary delay in receiving refunds upon successful prosecution of such a suit is two years, and that the courts of Illinois do not award interest to taxpayers who successfully follow the aforesaid statutory remedy at law. The taxpayer sought a preliminary and permanent injunction preventing the Collector from taking any action to collect taxes in excess of the proper amount.

The tax officials filed a motion to dismiss on November 3, 1978, requesting the District Court to dismiss the Complaint on the basis of 28 U.S.C. § 1341, which provides:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

On November 30, 1978, the District Court dismissed the Complaint for want of jurisdiction. The District Court stated:

1. The availability of equitable and declaratory relief in the Illinois state courts provides the plaintiff with a 'plain, speedy and efficient' remedy. *Tully v. Griffin*, 429 U.S. 68 (1976).
2. The non-payment of interest on refunds pursuant to Sections 675 and 716 of Chapter 120, Illinois Revised Statutes, does not render the remedy in Illinois courts not 'plain, speedy and efficient'.

The District Court did, however, grant the taxpayer an injunction pending appeal pursuant to Rule 62(c) of the Federal Rules of Civil Procedure.

The Seventh Circuit unequivocally held that the remedies available to a taxpayer under Illinois' statutes and cases* do not square with the requirement of the Federal Anti-Tax Injunction Act, 28 U.S.C. § 1341, that they be plain, speedy and efficient.

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* Illinois provides at least the following remedies to a taxpayer whose real estate is overassessed:

1. Administrative, pre-assessment—The assessor cannot increase a real estate assessment in a non-quadrennial year without first giving the taxpayer notice of such proposed increase and the right to be heard thereon. See Ch. 120, par. 578, 579, Ill. Rev. Stat. 1977; *Goodfriend v. Board of Appeals*, 18 Ill. App. 3d 412, 305 N.E.2d 404 (1st Dist. 1973).

2. Administrative post-assessment—The assessor has discretion upon application by the taxpayer to offer a certificate of error in certain situations. See Ch. 120, par. 604, Ill. Rev. Stat. 1977.

3. Administrative-assessment review—Prior to issuance of the tax bills, the Board of Appeals of Cook County has statutory power to review assessments and order them corrected. See Ch. 120, pars. 594, 598, Ill. Rev. Stat. 1977; *People ex rel. Korzen v. Fulton Market Cold Storage*, 62 Ill. 2d 443, 343 N.E.2d 450 (1976).

4. Statutory legal remedy—With payment under protest and exhaustion of administrative remedies, a taxpayer may file an objection to the collector's application for judgment and sale of delinquent real estate. The circuit court possesses the power in this proceeding to determine whether the assessment is correct. See Ch. 120, pars. 675, 716, Ill. Rev. Stat. 1977; *LaSalle National Bank v. County of Cook*, 57 Ill. 2d 318, 312 N.E.2d 252 (1974).

5. Injunctive Relief—A taxpayer may obtain injunctive relief when the legal remedy is unavailable. *Clarendon Associates v. Korzen*, 56 Ill. 2d 101, 306 N.E.2d 299 (1973); *28 East Jackson Enterprises v. Cullerton*, 523 F.2d 439 (7th Cir. 1975); *cert. denied*, 423 U.S. 1073 (1976). Supplemental Opinion upon Denial of Rehearing, 551 F.2d 1093 (7th Cir. 1976), *cert. denied*, 434 U.S. 835 (1977).

6. The remedies available to a taxpayer in Illinois include a 42 U.S.C. § 1983 claim. The Illinois Appellate court for the District in which the taxpayer's property is located has stated that, ". . . the courts of the State of Illinois have concurrent jurisdiction with the Federal courts to hear claims founded upon alleged violations of 42 U.S.C. § 1983." *Alberty v. Daniel*, 25 Ill. App. 3d 291, 295, 323 N.E.2d 110 (1st Dist. 1974).

In particular the Seventh Circuit has focused upon (1) the failure of the prepayment remedy of the Illinois Revenue Act of 1939, Ch. 120, pars. 675, 716 to provide for the payment of interest upon refunds of successfully protested taxes, and (2) the question of whether the admitted availability of Illinois courts for a § 1983 action bars jurisdiction under 28 U.S.C. § 1341. The Court of Appeals stated:

> Our review of the respective legislative histories of the Tax Injunction Act and section 1983 leads to the conclusion that Congress did not intend that the possibility of bringing a section 1983 action in state court would bar, pursuant to the Tax Injunction Act, federal jurisdiction over a section 1983 action brought in federal court. Further, we have concluded that there is no legal or equitable remedy available under Illinois law which is "plain, speedy and efficient."

LaSalle, 604 F.2d at 540.

It thus follows from this ruling that any and every Illinois taxpayer desirous of litigating tax assessments may choose to bring his case in the District Court for an injunction against the collection of the tax. This state of affairs, though seldom arising, nonetheless presents grave difficulties in the relationship between the state and federal courts. Both the Supreme Court of Illinois and this Court have held the use of injunctive power in the area of state tax collection to be extremely sensitive.

In *Chicago, Burlington and Quincy Railroad Co. v. Frary*, 22 Ill. 34 (1859), affirming the denial of a tax injunction, the Supreme Court of Illinois observed:

> Let us now, by sustaining this bill stretch out the strong arm of this court and stay the hand of the collector in every case where any irregularity can be shown in the assessment of the revenue, and a flood of injunctions would be spread over the land

> at once, State and County revenue would cease to be collected, at least till termination of protracted litigation, and the wheels of government would stop. (22 Ill. at 36.)

The concern expressed by the court in *Frary* has led to ". . . procedures for mass assessment and collection of . . . taxes and for administration and adjudication of taxpayers' disputes with tax officials (which) are generally complex and necessarily designed to operate according to established rules . . . of state procedure." *Perez v. Ledesma*, 401 U.S. 82, 127-128, n. 17, Brennan, J., concurring (1971).

In the different, though highly relevant, context of the income tax, this Court stated that, "(T)axes are the life blood of government, and their prompt and certain availability an imperious need". *Bull v. United States*, 295 U.S. 247, 259 (1935).

This Court has noted the sensitive nature of federal tax injunctions and has observed that:

> The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations require that such relief should be denied in every case where the asserted federal right may be preserved without it.

Matthews v. Rogers, 284 U.S. 521, 525-526 (1932); see also *Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976).

The petitioners respectfully submit that the serious potential impact of the Seventh Circuit's opinion upon the collection of real estate taxes in Illinois, standing alone, warrants review by this Court.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS THAT AN AVAILABLE CONCURRENT STATE COURT § 1983 ACTION FAILS TO PROVIDE A STATE REMEDY ACCEPTABLE UNDER 28 U.S.C. § 1341 IS IN CONFLICT WITH THIS COURT'S HOLDING IN *TULLY v. GRIFFIN, INC.*, 429 U.S. 68 (1976), AND RAISES SIGNIFICANT, DISPUTED AND FUNDAMENTAL QUESTIONS REGARDING THE DISTRIBUTION OF JUDICIAL POWER BETWEEN STATE AND FEDERAL COURTS.

> A federal district court is under an equitable duty to refrain from interfering with a State's collection of its revenue *except in cases where an asserted federal right might otherwise be lost.*

Tully v. Griffin, Inc., 429 U.S. 68, 73 (1976).

The "asserted federal right" which the taxpayer seeks to vindicate by its complaint in federal court is based upon the Civil Rights Act, 42 U.S.C. § 1983. The taxpayer asserts that the assessment was intentionally excessive, and that its right to equal protection is therefore violated. Thus, the taxpayer contends, a federal injunction should issue against petitioners' attempts to collect the tax.

On the other hand the tax authorities, your petitioners, have at stake the following concerns: First, tax injunctions directly stem the flow of necessary revenue and thus constitute a direct threat to the fiscal interests of the state. See *Chicago, Burlington and Quincy Railroad Co. v. Frary*, 22 Ill. 34, 36 (1859); *Matthews v. Rogers*, 284 U.S. 521, 525-526 (1932); cf. *Bull v. United States*, 295 U.S. 247, 259 (1935). Secondly, tax injunc-

tions always transfer the risk of taxpayer insolvency to the government.*

In order to protect these competing interests this Court, prior to the adoption of § 1341, and Congress thereafter, has limited federal jurisdiction in tax cases to those where ". . . an asserted federal right might otherwise be lost." *Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976).

Illinois law is clear that civil rights actions filed pursuant to 42 U.S.C. § 1983 may be maintained in Illinois

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* A notorious example of this phenomenon exists here in the Seventh Circuit with regard to a downtown Chicago property located at 28 East Jackson Street. As described by Mr. Justice Downing in *28 East Jackson Enterprises v. Rosewell*, 63 Ill. App. 3d 880 (1st Dist. 1978) 380 N.E.2d 395, a taxpayer employed:

> [a] series of cases in both the State and Federal courts by which plaintiff has avoided entirely the payment of real estate taxes on the subject property since 1971. The history of plaintiff's legal maneuvers is set forth in *28 East Jackson Enterprises, Inc. v. Rosewell* (1976), 65 Ill. 2d 420, 358 N.E.2d 1139, in *28 East Jackson Enterprises, Inc. v. Cullerton* (7th Cir. 1975), 523 F.2d 439, and in *28 East Jackson Enterprises, Inc. v. Cullerton* (7th Cir. 1977), 551 F.2d 1093, and will not be repeated here.
>
> It is sufficient here to say that these maneuvers suggest a pattern whereby plaintiff has taken advantage of an unresolved question of Illinois law, a gray area of Federal-State relations, and the delays inherent in the judicial process to delay the sale of its tax-delinquent property until after the following year's taxes have also become delinquent, after which a new suit is filed raising the same precise issues and beginning the process anew.

28 E. Jackson, supra 63 Ill. App. 3d at 881-82.

Having delayed the payment of more than $700,000 in real estate taxes for more than eight years, the taxpayer filed for a reorganization under Chapter 11 of the Bankruptcy Act in late 1979. See, *In the Matter of 28 East Jackson Enterprises, Inc., Debtor.* 79 B 39051, United States Bankruptcy Court, Northern District of Illinois, Eastern Division.

courts. *Alberty v. Daniel*, 25 Ill. App. 3d 291, 295 (1st Dist. 1974), 323 N.E.2d 110; *Bohacs v. Ried*, 63 Ill. App. 3d 477, 481-82 (2nd Dist. 1978), 379 N.E.2d 1372. *Alberty* is settled law in the First Appellate District of Illinois, and is binding upon the Circuit Court of Cook County, Illinois, the state forum which would have venue and jurisdiction of a state § 1983 tax action in this case. These holdings are in accord with the emerging majority view on this question. See *Advertiser Co. v. Wallace*, 446 F. Supp. 677, 681 (N.D. Ala. 1978); *Green v. Klinkofe*, 422 F. Supp. 1021, 1026-27 (N.D. Ind. 1976); *Long v. District of Columbia*, 469 F.2d 927, 937 (D.C. Cir. 1972); *Terry v. Kolski*, 78 Wis.2d 475, 254 N.E.2d 704 (1977). The only case cited by the Seventh Circuit which holds to the contrary is *Chamberlain v. Brown*, 223 Tenn. 25, 442 S.W.2d 248 (1969). However *Chamberlain* was specifically discussed, considered, and rejected in *Alberty, supra* at 25 Ill. App. 3d at 295.

Furthermore, *Alberty* and *Bohacs* find sound support in the early concurrent remedy cases of *Claflin v. Houseman*, 93 U.S. 130 (1876) and *Houston v. Moore*, 18 U.S. (5 Wheat) 1, 25-27 (1820). *Claflin* was no stranger to Illinois courts and, in fact, was cited as authority in *McLean v. St. John*, 10 Ill. App. 367, 368 (4th Dist. 1882) on the issue of concurrent jurisdiction in a bankruptcy matter.

The petitioners respectfully submit that the availability of Illinois courts for § 1983 actions as expressed in *Alberty* operates to preserve all federal rights which could be premised on the civil rights act. Under *Tully*, the federal court had a duty to ". . . refrain from interfering with [a state's] collection of its revenue." *Tully v. Griffin, supra* at 74. [parenthetical insert for clarity]

Despite the force and clarity of the *Tully* holding, and the full availability of a state civil rights action, the Seventh Circuit nonetheless dropped the bar of § 1341. The opinion, in effect, established a special rule for § 1983 tax actions which operates to preserve federal jurisdiction even though a clear forum in the state court exists to adjudicate exactly the same claim advanced in the federal district court. Thus, the court's opinion ignores the willingness of Illinois to afford its citizens a state forum for reviewing § 1983 claims, and describes the clear application of § 1341 as a "perverse result." 604 F.2d at 540.

The result is "perverse" only if one indulges in a value judgment in favor of the federal courts hearing § 1983 tax cases and against state involvement in them. However, it is the place of Congress to make such value judgments,* and it did so by passing § 1341 which is a clearly articulated limitation upon federal jurisdiction of § 1983 actions involving state taxes.

The Court of Appeals urges that the tax officials' position is impractical and ". . . undermines judicial efficiency and legal expertise". 604 F.2d at 538-39. Petitioners submit that the obvious influx of § 1983 tax injunction cases which the panel opinion invites** cannot much help the efficiency of the district judge, whose substantial expertise is not generally considered to include state tax overvaluation claims.

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* Mr. Justice Frankfurter cautions as follows: "We must be wary against interpolating our own notions of policy in the interstices of legislative provisions." *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 11 (1942).

** More than 1100 specific valuation objections are filed each year in Cook County alone.

Petitioners urge a case which presents a classic converse-Erie situation. See Hill, *Substance and Procedure in State FELA Actions—the Converse of the Erie Problem*, 17 Ohio St. L.J. 384 (1956); Note, *State Enforcement of Federally Created Rights*, 73 Harv. L. Rev. 1551, 1560-61 (1960). In a diversity case the federal court decides state claims based upon state law. Under *Alberty* the state court decides federal claims based on federal law. The former situation is impelled by the statute authorizing federal jurisdiction, the latter by express congressional limitations thereon, all in accord with prime considerations of comity and federalism. The petitioners submit there is nothing impractical in deciding the case in a manner which preserves the fiscal integrity of the state.

The petitioners submit that the Court of Appeals' refusal to accept the clear mandate of *Tully* stems first from the court's distaste for the resulting limitation of federal jurisdiction in tax cases which the court found to be ". . . an untenable conclusion: the Tax Injunction Act would bar federal jurisdiction in all cases involving state tax operations—without exception." 604 F.2d at 538. However the court's resolution of the issue, while rhetorically appealing, completely begs the question. As long as state remedies are "plain, speedy and efficient" as we contend a state § 1983 action would be*, then

* While the Court of Appeals found that an Illinois § 1983 remedy was not plain because of uncertainty as to the law applicable, that concern is illusory. 604 F.2d at 537-38. Illinois Courts possess the full panoply of injunctive powers necessary to protect federal constitutional rights. Indeed, the Seventh Circuit noted in *Huber Pontiac, Inc. v. Whitler*, 585 F.2d 817 (7th Cir. 1978) that "Illinois courts are not adverse to hearing constitutional challenges similar to Huber's complaints with Rule 2-4 [due process challenge]." *Huber, supra* at 821 [parenthetical insert for clarity]. See also *Coon v. Teasdale*,

(Footnote continued on following page)

§ 1341 would bar federal jurisdiction, without exception, even under the existing law of the Circuit. See *28 East Jackson Enterprises, Inc. v. Cullerton*, 523 F.2d 439 (7th Cir. 1975).

Secondly the Court of Appeals' decision appears to be based upon a fundamental distrust of the state court as an appropriate forum for the vindication of federal constitutional rights in tax cases. 604 F.2d 539-40; compare *Stone v. Powell*, 428 U.S. 465, 493-94 n. 35 with *Juidice v. Vail*, 430 U.S. 327, 342-346, Brennan, J., dissenting, and Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105 (1977). However if the Anti-Tax Injunction Statute means anything, it must mean that Congress has unambiguously decided to commit those federal rights to the courts of the several states for adjudication.

The foregoing questions are of significant and fundamental import to both federal and state courts. Review by certiorari is most appropriate to resolve these questions in a manner supportive of the federalism upon which this nation's body politic is based.

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* *continued*
567 F.2d 820, 822 (8th Cir. 1977). The only "uncertainty" that exists in this case, results from the taxpayer's failure to submit its federal claims to the state court for determination. See, e.g., *28 East Jackson, Inc. v. Rosewell*, 65 Ill. 2d 420, 358 N.E.2d 1139 (1976); *28 East Jackson Enterprises, Inc. v. Rosewell*, 63 Ill. App. 3d 880 (1st Dist. 1978), 380 N.E.2d 395.

II.

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE HOLDING OF THE FIFTH CIRCUIT IN *BLAND v. McHANN*, 463 F.2d 21 (5th CIR. 1972) UPON THE QUESTION WHETHER FAILURE OF A STATE STATUTORY REFUND SCHEME TO PROVIDE FOR PRE-JUDGMENT INTEREST RENDERS THE STATE REMEDY NOT PLAIN, SPEEDY AND EFFICIENT WITHIN THE MEANING OF 28 U.S.C. § 1341.

The question whether a state's tax refund remedy must include pre-judgment interest is an open one which this Court did not reach in *Department of Employment v. United States*, 385 U.S. 355, 358 (1966). Subsequently the Fifth Circuit in *Bland v. McHann*, 463 F.2d 21 (5th Cir. 1972) held that a Mississippi remedy which ". . . makes no provision for the recovery of interest on illegally assessed taxes. . . ." (463 F.2d at 28 n. 24) nonetheless squares with the requirements of the Anti-Tax Injunction Act.

The conflict between *Bland* and *LaSalle* is clear. Petitioners submit that the Seventh Circuit has mistakenly elevated pre-judgment "interest" on tax refunds to a right or entitlement.*

However the law is clear that interest is a matter of statute, not of right as demonstrated by *United States v. Board of Commissioners of Comanche County, Oklahoma*, 6 F. Supp. 401 (W.D. Okla. 1934); *United States v. Board of County Commissioners of Pawnee*

* *Fulton Market Cold Storage Co. v. Cullerton*, 582 F.2d 1021 (7th Cir. 1978) treats "interest" as an element of damages resulting from an overassessment in violation of a taxpayer's civil rights. 582 F.2d at 1080. No authority is advanced to support that conclusion, nor does the court distinguish between the pre-judgment or post-judgment nature of interest.

County, Oklahoma, 13 F. Supp. 641 (N.D. Okla. 1936); and *Bertelsen & Petersen Engineering Co. v. United States*, 60 F.2d 745 (1st Cir. 1932). In the *Comanche County* case the court held that a taxpayer who was entitled to a refund of local real estate taxes paid, was not entitled to interest from the local tax collecting authority. The court stated:

> "On the question of interest, the court appreciates the position of the defendant. Where taxes are paid, under protest, the collecting authority can only hold them in trust, and since Comanche County would be regarded in this case as a trustee, this court knows of no provision for the payment of interest from some other fund whose application had been provided by statute." (6 F. Supp. at 413.)

And in *Bertelsen*, the First Circuit in holding that interest on federal income refunds could be awarded only if a statute so provided, stated:

> ". . . Interest against the government is only allowable as provided by statute, *Angarica v. Bayard*, 127 U.S. 251, 260, 8 S. Ct. 1156, 32 L. Ed. 159; *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 49 S. Ct. 52, 73 L. Ed. 170. There is no fixed right to it. It depends on the law at the time when the claim is allowed by the department, or, if the claim is litigated, when the case is heard by the court. *Hind v. United States*, 41 F.2d 892 (Ct. Cl.)." (60 F.2d at 748.)

See also this Court's holding in *Board of Commissioners of Jackson County, Kansas v. United States*, 308 U.S. 343 (1939).

However the Seventh Circuit was not persuaded by *Bland*, and after discussing several cases cited by the plaintiff, some of which the opinion concedes to be inapposite, (604 F.2d at 534 n. 7) others decided before the passage of § 1341, held that the ". . . economics of dis-

pute resolution . . ." favor a rule that interest ought to be paid on Illinois tax refunds in order for the system to be considered adequate.

The premise for this rule is derived from *Georgia R.R. v. Redwine*, 342 U.S. 299 (1952), a case dealing with attempts to tax a state-chartered railway company. The opinion overlooks the distinction that in *Redwine* the question was whether, in view of the federal contract clause protection afforded the railroad, a state remedy which forbade an injunction was adequate under § 1341. The Supreme Court of the United States held it was not, and observed that the alternative, filing for refunds in each county in which the railroad was taxed, did not present an adequate remedy.

The application of *Redwine*, and its underlying basis as perceived by the panel opinion, is inappropriate here because the plaintiff does not allege that the real estate tax is levied without authority or upon exempt property.

Illinois has always, unlike Georgia in *Redwine*, allowed injunctions to issue if a taxpayer can show that his property is exempt or that the tax, as in *Redwine*, is unauthorized by law: See *Clarendon Associates v. Korzen*, 56 Ill. 2d 101, 306 N.E.2d 299 (1973); *Dee-El Garage v. Korzen*, 53 Ill. 2d 1, 289 N.E.2d 431 (1972); *Nabisco, Inc. v. Korzen*, 68 Ill. 2d 451, 454, 369 N.E.2d 829 (1977), appeal dismissed 435 U.S. 1005 (1978). Of course, it makes sense to allow the statutory and constitutional authorization of a tax to be litigated in one proceeding.

However, the taxpayer's claim herein is premised upon overassessment, not lack of statutory authority. Therefore the panel opinion's reliance upon *Redwine* is misplaced.

The petitioners suggest that § 1341 does not require Illinois to present the "best" remedy, but rather one that is plain, speedy and efficient. See *Miller v. Bauer*, 517 F.2d 27, 32 (7th Cir. 1975); *Bland v. McHann, supra*, at 29. Given the complexities of local real estate tax evaluation cases, the petitioners submit that the present remedy squared with § 1341.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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January 25, 1980

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

No. 78-2594

LASALLE NATIONAL BANK, Trustee under Trust No. 44891,

Plaintiff-Appellant,

v.

EDWARD J. ROSEWELL, Treasurer of Cook County, and THOMAS M. TULLY, Assessor of Cook County,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 78-C-3746—**Nicholas J. Bua**, *Judge.*

ARGUED APRIL 25, 1979—DECIDED AUGUST 24, 1979

Before SWYGERT, *Circuit Judge,* MOORE, *Senior Circuit Judge,** and TONE, *Circuit Judge.*

SWYGERT, *Circuit Judge.* This appeal involves the Federal Tax Injunction Act and its construction with section 1983 of the Civil Rights Act. Plaintiff-appellant LaSalle National Bank[1] brought this civil

* The Honorable Leonard P. Moore, Senior Circuit Judge of the United States Court of Appeals for the Second Circuit, is sitting by designation.

[1] Although LaSalle National Bank, as trustee under land trust No. 44891, is the named plaintiff-appellant, Patricia Cook, as sole beneficiary under the trust, is the real party in interest.

rights injunction action under 42 U.S.C. § 1983 against Edward J. Rosewell, Treasurer of Cook County and Thomas M. Tully, Assessor of Cook County. The action sought to enjoin the collection of excessive real estate taxes for 1977 allegedly imposed in violation of plaintiff's due process and equal protection rights under the Fourteenth Amendment. The sole issue on appeal is whether federal district court jurisdiction over this action is barred by the Tax Injunction Act of 1937. 28 U.S.C. § 1341. We conclude that jurisdiction is not barred and reverse the judgment of the district court.

I.

Plaintiff is the owner of a twenty-two unit apartment building in the all black, economically depressed community of East Chicago Heights in Cook County, Illinois.[2] On January 1, 1977 this property had a fair cash value of $46,000. According to Illinois statute, the property should have been assessed at 33% of its fair cash value: approximately $15,000. Nevertheless, the assessor assessed the property at $52,150, more than triple the correct assessment. As a result plaintiff's tax bill was $6,106 rather than $1,775. This bill was over three times the amount plaintiff would have been required to pay if she had been taxed at the correct rate.

Plaintiff alleges that the assessor knowingly as official policy or as governmental custom has maintained a system of assessment in Cook County which has produced egregious disparities in the ratio between the assessed valuation and the fair cash value of real property. The complaint further alleges that these overassessments are greater in frequency and size in older communities in which property is owned and inhabited primarily by members of racial minority groups and the economically disadvantaged.

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[2] For purposes of this appeal, the factual allegations of plaintiff's complaint are assumed to be true. *See* e.g. *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 174-75 (1965); Fed.R.Civ.P. 12(b)(1).

In 1977, as well as in each of the preceding three years (in which plaintiff's property similarly was overassessed), plaintiff sought administrative relief from the Board of Tax Appeals of Cook County. In each of those years, the Board referred plaintiff's complaint to the assessor for recommendation, and in each year the assessor recommended "no change" in the assessment. The Board denied plaintiff's petition for administrative relief each year.

Having been denied administrative relief, plaintiff's only remedy at law was to pay the full amount of the tax claimed by the county collector (defendant Rosewell, Treasurer of Cook County) pursuant to the assessor's assessment, and thereafter objecting and suing for refund at the collector's annual Application for Judgment in the Cook County Circuit Court. *See* Ill. Rev. Stat. 1971, ch. 120, §§ 675, 716. According to plaintiff, the customary delay in receiving refunds after a successful prosecution of a tax refund suit is two years. Further, under Illinois law, no interest may be paid to a successful claimant who has secured the refund of real estate taxes paid under protest.

Plaintiff pursued her legal remedy in 1974, 1975, and 1976 and ultimately received refunds for the three years in May, 1978. Plaintiff had been required to deposit payments for illegally exacted taxes in the approximate amounts of $4,600 for 1974, $3,650 for 1975, and $3,950 for 1976, for three, two and one years, respectively. At 8% interest (the average prime rate for the three-year period), plaintiff lost approximately $2,000 because of her inability to use money which ultimately was deemed to be rightfully hers. Plaintiff contends that approximately $4,300 of her 1977 tax bill of $6,106 is an illegal overcharge and that she would be forced to deposit the $4,300, with no possibility of receiving interest on a refund, along with her correct tax payment in order to seek legal redress.

Plaintiff has not paid her 1977 taxes. Instead, on September 19, 1978 she filed this action in federal district court to enjoin the county collector from listing, advertising, proceeding to judgment and order of sale,

or selling plaintiff's property as payment for any outstanding tax bill in excess of the amount she is legally required to pay. On November 3, 1978 defendants moved to dismiss the complaint on the grounds that it was barred by the Tax Injunction Act. 28 U.S.C. § 1341. The district court agreed with defendants and dismissed plaintiff's complaint on November 30, 1978.[3] This appeal followed.

II

The Tax Injunction Act mandates that federal district courts "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the court of such State." 28 U.S.C. § 1341. This command has been followed consistently. *See* e.g., *Tully v. Griffin*, 429 U.S. 68; *Huber Pontiac, Inc. v. Whitler*, No. 77-1975 (7th Cir. Sept. 19, 1978). The converse of this proposition, however, is equally true. As the legislative history of the Act clearly indicates, an action for injunctive relief brought in a federal district court "will not be withdrawn from the jurisdiction of the . . . court *except* where there is a plain, speedy, and efficient remedy at law or in equity in the courts of the State . . . ." S. Rep. No. 1035, 75th Cong., 1st Sess. 2 (1937) (emphasis added).

Defendants contend that there are two legal avenues available to plaintiff which offer "plain, speedy and efficient" relief within the judicial system of Illinois. First,

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[3] The district court ruled:

> 1. The availability of equitable and declaratory relief in the Illinois state courts provides the plaintiff with a "plain, speedy and efficient" remedy. *Tully v. Griffin*, 429 U.S. 68 (1976).
>
> 2. The non-payment of interest on refunds pursuant to Sections 675 and 716 of Chapter 120, Illinois Revised Statutes, does not render the remedy in Illinois courts not "plain, speedy and efficient."

LaSalle Nat'l Bank v. Rosewell, No. 78-3746 (N.D. Ill. Nov. 30, 1978). The district court, however, did grant plaintiff an injunction pending this appeal pursuant to Fed.R.Civ.P. 62(c).

defendants argue that the delay in payment and the failure to pay interest on refunds made pursuant to successful suits for tax refunds brought under Ill. Rev. Stat. 1977, ch. 120, §§ 675, 716, do not render this statutory remedy (paying the full amount of the tax bill and then suing for refund) inadequate.[4] Our disagreement with this position is developed in Part A of this opinion. Second, defendants suggest that plaintiff can redress any alleged grievances concerning her property tax assessment by filing a civil rights action under 42

[4] Federal equity practice prior to the passage of the Tax Injunction Act of 1937 refrained from exercising jurisdiction over actions challenging state tax systems as long as an "adequate" state remedy was available. There was some question whether enactment of the 1937 Act was meant to alter this standard. *See* P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, *Hart & Wechsler's, The Federal Courts & the Federal System*, 979 (2d ed. 1973) [hereinafter cited as *Hart & Wechsler.*] There is nothing in the legislative history of the Act to suggest that such a change was contemplated by the Act's drafters or sponsors. The legislative history focuses entirely on the problems caused by injunctions issued by district courts exercising their diversity jurisdiction. *See* S. Rep. No. 1035, 75th Cong., 1st Sess. (1937); H. Rep. No. 1503, 75th Cong., 1st Sess. (1937); 81 Cong. Rec. 1415-17 (1937). *See also Fulton Market Cold Storage Co. v. Cullerton*, 582 F.2d 1071, 1074-75 (7th Cir. 1978) *cert. den.* 99 S.Ct. 1033 (1979). *Garret v. Bamford*, 538 F.2d 63, 66-67 (3d Cir.) *cert. den.* 429 U.S. 977 (1976). And in *Great Lakes Co. v. Huffman*, 319 U.S. 293 (1943), the Supreme Court described the passage of the Tax Injunction Act as congressional confirmation of traditional federal equity practice. *Id.* at 298-99. *See also, Tully, supra*, 429 U.S. at 73. The Supreme Court has used the traditional standard and the statutory standard interchangeably, and so shall we. *See Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, 605 (1951); *Hillsborough v. Cromwell*, 326 U.S. 620, 624, 626 (1946); *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105-106 (1944). *See also* Wright, *Federal Courts* 217 (3d ed. 1976) [hereinafter cited as *Federal Courts*].

The substantive interchangeability of the two standards is important for more than the linguistic flexibility it makes possible. To the extent that the standards are the same, cases decided prior to the enactment of the 1937 Act remain instructive in defining the circumstances in which a federal court may or may not exercise jurisdiction over an injunction action involving a state tax system.

U.S.C. § 1983 in state court. The availability of this mode of relief, defendants argue, provides a "plain, speedy and efficient" remedy in the Illinois courts, thereby barring the equitable jurisdiction of the federal courts. Our analysis of this proposition and our conclusion that the availability of a section 1983 action in state court does not bar federal court jurisdiction comprise Part B of this opinion. We conclude that the Tax Injunction Act does not preclude federal jurisdiction over plaintiff's action, and thus the district court had and should have retained jurisdiction over plaintiff's prayer for relief.

A.

Under Illinois law, the only remedy available to a Cook County property taxpayer billed pursuant to an erroneous assessment is to pay the tax in full and then sue in the Cook County Circuit Court for a refund of the erroneously collected portion of the tax payment. A taxpayer who successfully sues and receives a refund is not entitled, according to Illinois law, to interest on the funds which erroneously had been collected by the County. *Lakefront Realty Corp. v. Lorenz*, 19 Ill. 2d 415 (1960). This rule was reiterated by the Illinois Supreme Court in *Clarendon Assoc. v. Korzen*, 56 Ill. 2d 95, 109 (1973):

> [U]nder the statutory remedy provided by sections 194 and 235 of the Revenue Act of 1939 (Ill. Rev. Stat. 1971, ch. 120, pars. 675 and 716) the taxpayer is not entitled to interest on the refund. This court also held in *Lakefront* that this fact does not render the remedy at law inadequate so as to justify equity in assuming jurisdiction. We see no reason to depart from that decision.

See also, Neubert v. Foxworthy, No. 79-121, (Ill. App. 4th Div., April 25, 1979); *Vretsky v. Baschen*, 47 Ill. App. 3d 169 (1977).[5]

[5] The 81st Illinois General Assembly last session failed to enact HB 451 and HB 1317, bills introduced which would have required payment of interest on tax refunds.

The question we must answer is whether this remedy, which requires prepayment of the entire tax bill and refunds erroneously collected monies without interest (and allegedly with an average delay of two years), is "plain, speedy and efficient." The Supreme Court in *Department of Employment v. United States*, 385 U.S. 355, 358 (1966) left undecided the question "whether omission to provide interest on a successful refund application renders the state remedy here an inadequate one within the meaning of § 1341." *See also, 28 East Jackson Enterprises v. Cullerton*, 523 F.2d 439, 441 n.4 (7th Cir. 1975) *rehearing denied*, 424 U.S. 959 (1976). There is no dispositive precedent on this issue. Our analysis of prior judicial decisions, however, indicates that the decisions which have considered the question most carefully have concluded that the failure to pay interest on a successful refund application makes the state remedy inadequate. Further, policy considerations, the legislative history of the Tax Injunction Act, and common sense all dictate the conclusion that the Illinois remedy is inadequate.

The court's opinion in *United States v. Livingston*, like other opinions since the passage of section 1341, observed that,

> It is well settled that a right to recover taxes illegally collected is not an adequate remedy if it does not include the right to recover interest at a reasonable rate for the period during which the taxpayer's money is withheld. Even if existence of the right be merely cast in substantial doubt, the remedy is not plain or adequate.[6]

United States v. Livingston, 179 F.Supp. 9, 15 (E.D. S.C. 1959) (three-judge court) (citations omitted) aff'd per

[6] Numerous courts have held that uncertainty about the adequacy of a state court remedy is sufficient to lift the § 1341 bar on federal court jurisdiction over equitable actions regarding state tax systems. *See* e.g. *Tully, supra*, 429 U.S. at 76; *Hillsborough, supra*, 326 U.S. at 629; *28 East Jackson, supra*, 523 F.2d 439; *Garrett, supra*, 538 F.2d at 70. Thus, even if the *Lakefront* rule had not been so definitively and recently articulated, uncertainty about the award of interest to a successful claimant under the Illinois statutory remedy would be sufficient to render the remedy inadequate.

curiam, 364 U.S. 981 (1960). *See also, Mullaney v. Hess*, 189 F.2d 417, 420 (9th Cir. 1951); *United States v. Department of Revenue*, 191 F.Supp. 723, 727 (N.D. Ill.), vacated, 368 U.S. 30 (1961).[7] And numerous cases prior to the passage of the 1937 Act held that the failure to pay interest on a tax refund constituted an alternative, but independent basis for concluding that the state remedy was inadequate. *Educational Films Corp. v. Ward*, 282 U.S. 375 (1931); *Hopkins v. Southern Cal. Tel. Co.*, 275 U.S. 393, 399-400 (1928); *Nutt v. Ellerbe*, 56 F.2d 1058, 1062 (E.D. S.C. 1932) (three-judge court); *Proctor & Gamble Distrib. Co. v. Sherman*, 2 F.2d 165, 166 (S.D. N.Y. 1924). As the Supreme Court concluded in *Educational Films*,

> The legal remedy . . . falls short of adequacy in at least two respects. [First] [r]efund, if any, is expressly without interest. § 219(d). *See Proctor & Gamble Distributing Co. v. Sherman*, 2 F.(2d) 165; *Southern California Telephone Co. v. Hopkins*, 13 F.(2d) 814, 820, aff'd 275 U.S. 393.

Educational Films, supra, 282 U.S. at 386 n.2.

Defendants cite a plethora of cases which they contend demonstrate that the failure to provide interest on a tax refund does not render a remedy inadequate. All of these cases are distinguishable from the problem raised by this appeal. Several of the cases analyzed the remedy provided by the state and, as defendants indicate, determined that it was adequate. *See Aluminum Co. of America v. Department of the Treasury*, 522 F.2d 1120

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[7] None of these cases ruled on the precise issue raised in this appeal. *Livingston* held that the failure to pay interest was "another reason" why § 1341 was inapplicable to the taxpayer's suit in that case. *Livingston, supra*, 179 F.Supp. at 13. *Mullaney*, after stating the legal principle, concluded that the remedy in question was adequate. And *Department of Revenue* concluded that the failure to pay interest to a successful claimant on the cost of a bond which had to be put up to pursue a remedy was analogous to the failure to pay interest on a tax refund, and, therefore, the remedy involving the bond was inadequate. Nevertheless, all of these cases lend substantial support to the conclusion that the failure to pay interest, alone, renders a remedy inadequate.

(6th Cir. 1975); *Group Assisting Sewer Proposal-Ansonia v. City of Ansonia*, 448 F.Supp. 45 (D.Conn. 1978); *Abernathy v. Carpenter*, 208 F.Supp. 793 (W.D. Mo. 1962), *aff'd* 373 U.S. 241 (1963). But in each of these decisions the adequacy of the state remedy was based, in part, either on the availability of interest on refunds, *Aluminum Co., supra*, 552 F.2d at 1127-28; *Group Assisting, supra*, 448 F.Supp. at 47, or on the fact that prepayment of the contested tax was not required. *Abernathy, supra*, 208 F.Supp. at 796-97.[8] And in the other cases upholding the adequacy of a state remedy cited by defendants, the relationship of nonpayment of interest to the adequacy of the state remedy apparently never was raised by the litigants and certainly never was expressly considered by the courts. *Board of County Comm'rs v. United States*, 308 U.S. 343 (1939); *Stratton v. St. Louis Southwestern Ry.*, 284 U.S. 530 (1932); *Bland v. McHann*, 463 F.2d 21 (5th Cir. 1972), *cert. denied*, 410 U.S. 966 (1973); *Bertelsen & Petersen Eng'r Co. v. United States*, 60 F.2d 745 (1st Cir. 1932); *United States v. Board of County Comm'rs*, 13 F.Supp. 641 (N.D. Okla. 1936); *United States v. Board of Comm'rs*, 6 F.Supp. 401 (W.D. Okla. 1934).[9] Thus none of these cases provides persuasive support for defendants' position.

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[8] The decisions in *Group Assisting* and *Abernathy* also are based, in the alternative, on the inconsequential amounts of money involved if interest were not recoverable on a contested tax payment. We do not decide the question whether a remedy is inadequate if it fails to provide for interest when the dollar amount in question is extremely small. We do note, however, that both the remedies considered in those cases provided for resolution of the dispute within a period of several weeks and the interest involved amounted to under $50.00. In the instant case, delays of two years are alleged and hundreds of dollars in lost interest are at stake for each year in which a wrongful assessment is made.

[9] In *Bland* the complaining taxpayer did object to the adequacy of the Mississippi remedy on the grounds, *inter alia*, that Mississippi law made "no provision for the recovery of interest on illegally assessed taxes," 463 F.2d at 28, n.24, but the court's opinion did not discuss this specific contention. And in *Stratton* which, like the other cases cited by defendants, did not address the relationship of the nonavailability of interest to the adequacy of the state remedy, the Court concluded:

(Footnote continued on following page)

The legislative history of the Tax Injunction Act similarly lends little support to defendant's contention that the failure to pay interest on tax refunds does not affect the adequacy of the state remedy. The two purposes of the Act, as described in the legislative history, were, first, to eliminate discrimination between state citizens who were required to pursue relief regarding illegal tax assessments in the state court and foreign corporations operating in the state which were able to sue under the diversity jurisdiction of the federal courts and, second, to prevent these foreign corporations, which frequently refused to pay their large state taxes and then initiated dilatory and expensive legal actions in the federal courts, from paralyzing state fiscal operations. S. Rep. No. 1035, 75th Cong., 1st Sess. (1937); 81 Cong. Rec. 1415-17 (1937). See also, *Garrett, supra*, 538 F.2d at 72; *Tramel v. Schrader*, 505 F.2d 1310, 1315-16 (5th Cir. 1975). Neither of these purposes conflicts with the rule suggested by federal cases decided prior to 1937 that the failure to provide for interest makes a tax refund remedy inadequate. See, *supra*, p. 8.

Perhaps even more importantly, the express principle underlying both of these congressional goals was that justice is best served by the speedy judicial resolution of tax disputes. Foreign corporations had been able to secure financial benefits for themselves by delaying tax collection through federal court litigation; state governments often were forced to accept ungenerous out-of-court settlements in order to secure sorely needed tax revenues. The Tax Injunction Act was a response to the "needs of many States for a more prompt disposition of tax controversies . . . ." S. Rep., *supra*, at 3. And excerpts from Congressional hearings regarding the Johnson Act of 1934, 28 U.S.C. § 1342, inserted into the Con-

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[9] *continued*

> There being a legal remedy for the recovery of the tax, no case is made for invoking the jurisdiction of equity to enjoin collection of it *in the absence of allegations setting up special circumstances which would render the legal remedy inadequate.*

284 U.S. at 534 (citations omitted) (emphasis added).

gressional Record in support of the Tax Injunction Act (often compared during its enactment process to the Johnson Act), decried the financial hardships imposed on a litigant drawn into federal court who is often unable to pursue his claim to a final judicial resolution. 81 Cong. Rec. 1415, 1417 (1937). The Illinois tax grievance remedy, which forbids the recovery of interest and allegedly involves a two year delay prior to refund payment, gives a financial incentive to one of the parties (the County) to delay dispute resolution and imposes severe financial hardships on private parties seeking to redress their grievances. Although the roles have been reversed, the available Illinois remedy exacerbates much the same evils as the Tax Injunction Act was designed to eliminate. *See generally Garrett, supra,* 538 F.2d at 72. It is unlikely that the drafters of the 1937 Act would have considered the Illinois statutory remedy "plain, speedy and efficient."

This concern with the economics of dispute resolution was reflected in the Supreme Court's decision in *Georgia R.R. v. Redwine,* 342 U.S. 299 (1952). In *Redwine,* one of the state remedies available to the aggrieved taxpayer required filing over three hundred separate claims in fourteen different counties in order to achieve full redress. And so while redress theoretically was possible in the state courts, the remedy's diseconomies rendered it inadequate. *Id.* at 303. *See also, 28 East Jackson, supra,* 523 F.2d at 441 (state remedy requiring full payment of tax not "available" when petitioner did not have and could not borrow sufficient funds to pay the full tax); *Federal Courts, supra,* at 217. Under present Illinois law, as under Georgia law in *Redwine,* relief is possible, but it imposes undue costs on taxpayers seeking redress. Under these circumstances, the state remedy is inadequate.

The most succinct analysis of the inadequacy of a tax grievance procedure which requires prepayment of the entire tax and then refuses to pay interest on the refunds awarded successful litigants was provided by Learned Hand over fifty years ago:

> [I]t seems to me plain that it is not an adequate remedy, after taking away a man's money as a condition of allowing him to contest his tax, merely to hand it back, when, no matter how long after, he establishes that he ought never to have been required to pay at all. Whatever may have been our archaic notions about interest, in modern financial communities a dollar to-day is worth more than a dollar next year, and to ignore the interval as immaterial is to contradict well-settled beliefs about value. The present use of my money is itself a thing of value, and, if I get no compensation for its loss, my remedy does not altogether right my wrong.

Proctor & Gamble, supra, 2 F.2d at 166. We agree with the conclusion of the court in *United States v. Livingston,* that

> [A state] may allow interest upon refunds of taxes or not as she chooses. If she does not make clear the existence of the right to recover such interest, however, she necessarily opens the door to equitable relief to taxpayers and forecloses a remission of the parties to the legal remedy provided by her statutes.

179 F.Supp. at 15. The failure to pay interest on refunds to taxpayers who successfully challenge their tax assessment pursuant to the Illinois statutory procedures renders that remedy inadequate. Thus, the availability of this remedy in the state courts does not bar federal jurisdiction over injunction actions brought by aggrieved Cook County taxpayers.

B.

Defendants also contend that plaintiff has a "plain, speedy and efficient remedy" in the state courts because she can challenge her allegedly discriminatory tax assessment by bringing an action pursuant to 42 U.S.C. § 1983 in an Illinois court.[10] We do not agree with defen-

[10] Defendants cite several federal district court decisions which have held, at least in the alternative, that the availabili-

(Footnote continued on following page)

dant's contention, and we hold that the availability of a section 1983 action in state court does not bar federal jurisdiction over a section 1983 action alleging constitutional deprivations arising from an illegal state tax exaction.

As a predicate to their contention that a section 1983 state court action bars federal jurisdiction in this case, defendants, citing two recent Illinois appellate cases, assert that state courts have jurisdiction to hear federal civil rights actions filed pursuant to 42 U.S.C. § 1983. *See Bohacs v. Reid*, 63 Ill. App.3d 477 (1978); *Alberty v. Daniel*, 25 Ill. App.3d 291 (1974). While this statement may well be true, it is by no means a settled rule of law.[11]

Similarly, plaintiff argues that an Illinois court adjudicating her section 1983 claim would be bound by the

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[10] *continued*
ty of a § 1983 action in state court constitutes an adequate remedy for an aggrieved taxpayer under § 1341, thereby precluding federal court jurisdiction over the taxpayer's complaint. *See Advertiser Co. v. Wallace*, 446 F.Supp. 677 (M.D. Ala. 1978); *Green v. Klinkofe*, 422 F.Supp. 1021 (N.D. Ind. 1976); *Horn v. O'Chesky*, 378 F.Supp. 1280 (D.N.M. 1974). None of these cases justifies its holding with any detailed analysis of the relationship between the two statutes. In addition, *Advertiser*, which held that a plaintiff seeking damages under § 1983 was barred from federal court by the Tax Injunction Act, is in direct conflict with our decision in *Fulton Market*, *supra*, 582 F.2d 1071.

[11] Most judicial decisions which have concluded that state courts can entertain § 1983 actions have reached their result with little analysis, relying on the general principle of concurrent jurisdiction. *See Long v. District of Columbia*, 469 F.2d 927, 937 (D.C. Cir. 1972); *Bohacs*, *supra*, 63 Ill. App.3d 477; *Alberty*, *supra*, 25 Ill. App.3d 291. *See generally*, *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 25-27 (1820); Hamilton, *The Federalist Papers*, No. 82. But courts which more closely have examined the concerns underlying the adoption of the civil rights statute have been more hard-pressed to justify state court jurisdiction over § 1983 actions. *Compare Terry v. Kolski*, 254 N.W. 2d 704 (S.Ct. Wis. 1977) (state courts open to § 1983 actions) *with Terry*, *id.* at 713 *et seq.* (dissenting opinion) and *Chamberlain v. Brown*, 442 S.W.2d (S.Ct. Tenn. 1969) (no state jurisdiction for § 1983 actions).

rule of *Lakefront* that a taxpayer who has secured a refund cannot receive interest on that refund. *See, supra*, p. 6. Consequently, plaintiff contends that this definitive precedent in state law renders a state section 1983 remedy inadequate. Plaintiff's argument assumes that an Illinois court adjudicating a federal claim under section 1983 would be free to apply Illinois equity law, a proposition that is far from certain.[12] Nevertheless, we believe that the doubt whether an Illinois court would apply federal equity law instead of the Illinois rule against interest on tax refunds renders a remedy pursuant to a possible section 1983 action in the state court less than plain.

But independent of this uncertainty about the adequacy of the remedy, an exact reading of the Tax Injunction Act and strict attention to the principles underlying section 1983 compel the conclusion that the

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[12] In *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), the Supreme Court held that in a state court action pursuant to 42 U.S.C. § 1982, questions regarding compensatory damages for the deprivation of a federal right are governed by federal standards under 42 U.S.C. § 1988. The Court also noted that a federal court can fashion an effective equitable remedy and that,

> That federal remedy for the protection of a federal right is available in the state court, if that court is empowered to grant injunctive relief, generally, as is the Virginia court. Va. Code Ann. § 8-610 (1957 Repl. Vol.).

Id. at 238.

Sullivan does not directly answer the question posed here: when state equitable law is at odds with federal law (as we have concluded it is here with regard to the adequacy of the Illinois refund remedy), which law would apply in a § 1983 action. While the inference from *Sullivan* is that federal law would apply, *see also Testa v. Katt*, 330 U.S. 386 (1947); *Ward v. Board of County Comm'rs (Love County)*, 253 U.S. 17 (1920); *General Oil Co. v. Grain*, 209 U.S. 211 (1908), that conclusion is not settled. *See generally, Fulton Market, supra*, 582 F.2d at 1080; *Hart & Wechsler, supra*, at 434-37, 521-24; Comment, *Racial Discrimination and the Tax Injunction Act*, 90 Harv. L. Rev. 616, 623-24 n.49 (1977); Note, *State Enforcement of Federally Created Rights*, 73 Harv. L. Rev. 1551, 1556-61 (1960).

availability of a state court action under section 1983 does not bar federal jurisdiction. Reading the Tax Injunction Act to bar federal court jurisdiction on the basis of the possibility of bringing a federal cause of action under section 1983 in state court leads to an untenable conclusion: the Tax Injunction Act would bar federal jurisdiction in all cases involving state tax operations—without exception. Defendants' position assumes that state courts generally have concurrent jurisdiction over federal causes of actions, including section 1983, and that a state court hearing that federal claim would apply federal equity law (if the state court were free to apply state equity law then, in this case, interest would not be available as part of the remedy and the remedy would be inadequate). But if both these assumptions were true, there would be no class of cases that would escape the bar on federal court jurisdiction contained in the Tax Injunction Act. Whatever action could be brought in federal court, given inadequate state statutory and judicial remedies, also could be brought in state court under federal law pursuant to the state court's concurrent jurisdiction. *See generally, Iowa-DesMoines Nat'l Bank v. Bennett*, 284 U.S. 239 (1931); *General Oil, supra*, 209 U.S. 211. Federal courts never would have jurisdiction over actions brought by taxpayers regarding illegal state tax assessments.

Although Congress possesses the power to legislate this result, there is no indication that the Tax Injunction Act was meant to do so.[13] The language of the Act on its face contemplates cases which will escape its jurisdictional proscription, and the explanations of the statute contained in its legislative history unmistakably corroborate this reading of the Act. *See supra* p. 4. *See also*

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[13] As the Fifth Circuit stated in *Tramel, supra*, 505 F.2d at 1326,

> Encroachments on the federal judiciary's power to vindicate rights allegedly guaranteed by the Constitution must be construed narrowly. *Cf. Phillips v. United States*, 1941, 312 U.S. 246, 251.

81 Cong. Rec. 1416 (1937) (remarks of Sen. Bone).[14] There is no reason to conclude that defendants' reading of the Tax Injunction Act—a reading which would lead to a result clearly not contemplated by the drafters of the Act—is correct.

Defendants' position makes even less sense as a practical matter. In order to argue that a section 1983 action brought in an Illinois court constitutes an adequate remedy, defendants must presume that federal equity law applies. But then it is difficult to conceive of any significant state autonomy interest that is served by barring federal court jurisdiction. Defendants' position leads to the scenario of a state court adjudicating a cause of action and formulating a remedy—and throughout required to apply federal law. It would be difficult to say that this is less of an incursion into state autonomy than an action in federal court. And this result undermines judicial efficiency and legal expertise. It is unlikely that when Congress drafted the Tax Injunction Act it intended that all disputes in which state legal and equitable remedies were inadequate be resolved in state court under these conditions.

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[14] There is a suggestion implicit in the legislative history of the Act that it is only when a state legal or equitable remedy is available and adequate—not when there is a federal remedy which can be brought in state court—that the jurisdictional bar applies. The Act's sponsor explained that "specific provision is made that the suit will be taken out of the jurisdiction of the Federal court only if a plain, speedy, and efficient remedy may be had at law or in equity in the courts of the State." 81 Cong. Rec. 1416 (1937) (remarks of Sen. Bone). Senator Bone also excerpted a portion of the Judiciary Committee Report on the Johnson Act and included it in the Congressional Record. He said the excerpt was "applicable to [the Tax Injunction Act] in the same manner that [it was] applicable to the Johnson Bill. *Id.* The excerpt described the archetype of the disputes meant to be excluded from federal court and added:

> And all the time in this dispute there is no Federal question involved. There is a dispute arising under a State statute or law of other origin and nothing more.

Id. at 1417. *See Garrett, supra*, 538 F.2d at 66-67.

Our conclusion that the possibility of bringing a section 1983 action in state court does not bar, pursuant to the Tax Injunction Act, federal jurisdiction over an action alleging that state taxes were exacted unconstitutionally, is corroborated by the principles and policies underlying 42 U.S.C. § 1983.[15] The sponsors, supporters and even the opponents of the predecessor of section 1983 likely would be shocked indeed if they were to learn that the possibility of bringing a section 1983 action in state court had barred a section 1983 plaintiff from federal court.

The Supreme Court in *Mitchum v. Foster*, 407 U.S. 225 (1972) observed:

> Section 1983 opened the federal courts to private citizens, offering *a uniquely federal remedy* against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation.

Id. at 239 (emphasis added). When Congress passed the predecessor of section 1983,

> [it] clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts.

Id. at 242.[16] The failure of state courts to vindicate federal rights was one of the primary motivations for

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[15] This assumes, of course, that there is no adequate legal or equitable remedy at state law.

[16] The congressional legislation passed to effectuate the post-Civil War amendments gave the federal courts primary responsibility for vindicating the rights expressed in those amendments:

> [The federal courts supplanted] the state courts as the principal forum for enforcing federal law . . . .

(Footnote continued on following page)

passage of the predecessor of section 1983. *Id.* at 240-42. *See also,* Wiecek, *The Reconstruction of Federal Judicial Power, 1863-1875,* 13 Am. J. Legal Hist. 333, 338 (1969); *Developments, supra,* at 1142-50. The legislative history of the Act is replete with references to the inability and unwillingness of state courts to protect federal rights and, as a result, to the need to insure access to the federal courts. *See Mitchum, supra,* 407 U.S. at 241 n.31; *Developments, supra,* at 1154-55 nn.112, 114. As the Supreme Court stated in *Monroe v. Pape,* 362 U.S. 167, 180 (1961):

> It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts . . . .

Defendants ask us to turn section 1983 on its head. If their argument were accepted, access to federal courts for the protection of Fourteenth Amendment rights would be denied because of the availability in state courts of "a uniquely federal remedy" which Congress enacted precisely because of the failure of state courts to protect federal rights. We do not embrace this perverse result. The legislative history of the statute compels our conclusion that the availability of a section 1983 action in state court does not bar federal jurisdiction over a section 1983 action brought in federal court to vindicate

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[16] *continued*

> This significant expansion of federal judicial power seems to reflect both the Republicans' belief that the judiciary was the most appropriate institution to effectuate their "moderate revolution" in civil rights and their increasing distrust of the willingness of state judges to enforce vigorously national laws or fulfill national policies. Rather than providing for a large-scale displacement of state police power by congressional regulation of intrastate affairs, the Republicans sought to create in the federal courts opportunities for litigants . . . to invoke the power of the national government to safeguard nationally secured liberties threatened by the action or inaction of the states.

Developments in the Law—Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1142, 1150 (1977) (citations omitted).

constitutional rights allegedly violated by an illegal state tax assessment.

Our review of the respective legislative histories of the Tax Injunction Act and section 1983 leads to the conclusion that Congress did not intend that the possibility of bringing a section 1983 action in state court would bar, pursuant to the Tax Injunction Act, federal jurisdiction over a section 1983 action brought in federal court, Further, we have concluded that there is no legal or equitable remedy available under Illinois law which is "plain, speedy and efficient."

For these reasons, we conclude that federal jurisdiction over plaintiff's suit was proper. The judgment of the district court is reversed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LaSalle National Bank, Trustee under
Trust No. 44891,

Plaintiff,

No. 78 C 3746 vs.

Edward J. Rosewell, et al.,

Defendants.

Before Nicholas J. Bua, *Judge*
United States District Court

ORDER

This matter came on upon plaintiff's motion for a preliminary injunction and this court having considered the motion, the brief of plaintiff, the motion of defendants to dismiss and having heard the arguments of counsel, finds:

1. The availability of equitable and declaratory relief in the Illinois state courts provides the plaintiff with a "plain, speedy and efficient" remedy. *Tully* v. *Griffin,* 429 U.S. 68 (1976).

2. The non-payment of interest on refunds pursuant to Sections 675 and 716 of Chapter 120, Illinois Revised Statutes, does not render the remedy in Illinois courts not "plain, speedy and efficient".

3. In order to maintain the status quo while plaintiff appeals from this Order, it is necessary that pursuant to Rule 62(c), Fed. R. Civ. Pro., an injunction pending appeal enter restraining the defendant Rosewell from proceeding to judgment and order of sale against the property,

Permanent Index No. 32 23 414 054, Volume 16, of the 1977 tax rolls and from selling said property in the matter of his annual application for judgment, etc., in the Circuit Court of Cook County.

(a) If such an injunction is not entered, the defendant will proceed to judgment against the property and the property will be sold at the annual tax sale unless the plaintiff redeems the property, with interest and penalties, thereby rendering it impossible for this or any other court to afford relief to plaintiff in the event it prevails upon appeal.

(b) The county will not suffer any damage by this injunction, since it will be entitled to full payment, plus interest, if this order is upheld.

(c) The public interest will not be harmed.

(d) There is a substantial likelihood that petitioner may prevail on appeal.

CONCLUSION

Under the provisions of 28 U.S.C. §1341 denying jurisdiction to this court in restraining the collection of state taxes when a plain, speedy, and efficient remedy exists in the state courts, this court has no jurisdiction of the subject matter of this complaint.

IT IS THEREFORE ORDERED that plaintiff's motion for a preliminary injunction is denied and that the complaint is dismissed for want of jurisdiction.

IT IS FURTHER ORDERED that pursuant to Rule 62(c), Fed. R. Civ. Pro., Edward J. Rosewell, defendant County Collector, is enjoined from proceeding to judgment and order of sale against Cook County property. Permanent Index No. 32 23 414 054, Volume 16, and from selling said property pending the appeal of this order to the United States Court of Appeals for the Seventh Circuit.

/s/ Nicholas J. Bua

United States District Judge

DATED: November 30, 1978

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 30, 1979

Before

Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. LEONARD P. MOORE, SR., *Circuit Judge*•
Hon. PHILIP W. TONE, *Circuit Judge*

LASALLE NATIONAL BANK, Trustee under Trust No. 44891,

Plaintiff-Appellant,

No. 78-2594 vs.

EDWARD J. ROSEWELL, Treasurer of Cook County, and THOMAS M. TULLY, Assessor of Cook County,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 78-C-3746 — NICHOLAS J. BUA, *Judge.*

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above entitled

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• Honorable Leonard P. Moore, Senior Judge for the U.S. Court of Appeals for the Second Circuit is sitting by designation.

cause by counsel for the defendants-appellees, a vote of the active members of the Court was requested, and a majority of the active members of the Court has voted to deny a rehearing *in banc.*** All of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

** Judges Pell, Sprecher, Bauer and Wood voted to grant the suggestion for rehearing *in banc.*